

IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Elizabeth Houston, as Sole Beneficiary  
Under the Will of Otho S. Houston,  
Deceased, and as Executrix of the  
Estate of Otho S. Houston, De-  
ceased,

*Plaintiff in Error.*

*vs.*

J. M. Rosborough,

*Defendant in Error.*

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OPENING BRIEF OF PLAINTIFF IN ERROR.

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**OPENING BRIEF OF PLAINTIFF IN ERROR.**

This is an action in deceit, instituted by defendant in error, Rosborough, against Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and also against Elizabeth Houston as executrix of the estate of said Otho S. Houston, deceased, to recover damages for an alleged fraud arising out of misrepresentations made by Otho S. Houston in his lifetime, and thereby inducing Rosborough to trade certain real estate in Los Angeles for a trust deed secured by certain real property in Texas belonging

to Houston. A demurrer was interposed in which it was averred that the complaint did not state facts sufficient to constitute a cause of action either against Elizabeth Houston as an individual or against her as executrix of the estate of her deceased husband. Misjoinder of parties defendant and misjoinder of causes of action were also averred. The demurrer was overruled and the parties proceeded to trial. The trial court found in favor of the defendant in error on questions of fraud and false representations, and judgment was thereupon entered against Elizabeth Houston, as executrix of the estate of said Otho S. Houston, deceased, for the difference between the value of the property received by him and the property traded by him, plus the rental value of the property traded by him from the date of the trade to the date of trial. The court also rendered judgment against Elizabeth Houston as an individual for the costs incurred in the trial. The specifications of error will be found on page 64 of the transcript.

We make the following contentions as warranting this court in reversing the action of the trial court and remanding the case with directions that judgment be entered herein that defendant in error take nothing:

First: That the cause of action in favor of defendant in error lapsed with and did not survive the death of Otho S. Houston, and that therefore the complaint did not state a cause of action, and the court erred in overruling the demurrer and in rendering judgment against the plaintiff in error.

Second: The complaint furthermore does not state a cause of action if we are to assume that the action is based on contract, in that there is no allegation and no affirmative finding that a claim was filed against the estate of Otho S. Houston prior to the institution of the action.

Third: There is absolutely no warrant for the judgment against Elizabeth Houston as an individual. The complaint did not state any cause of action against her on any possible theory, and the findings do not support any judgment against her as an individual.

Fourth: The judgment against Elizabeth Houston as executrix is excessive to the extent of twenty-seven hundred sixty dollars (\$2760.00) thereof. Defendant in error recovered judgment against Elizabeth Houston as executrix not only to the extent of the difference between the reasonable value of what he parted with and the reasonable value of what he received, but also to the extent of twenty-seven hundred sixty dollars (\$2760.00) which consisted of the rental value of defendant's in error demised premises from the date of the trade to the date suit was filed.

The specifications of error relied upon are as follows:

I.

That the said United States District Court for the Southern District of California, Southern Division, erred in overruling the demurrer interposed by the

defendant and appellant to the original complaint filed in the cause.

II.

Said court also erred in rendering judgment against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, for the reason that the special findings made and filed herein by the court do not support such judgment.

III.

Said court also erred in rendering judgment against Elizabeth Houston, as an individual, for the reason that the special findings made and filed herein by the court do not support such judgment.

IV.

Said court erred in rendering judgment against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, and also erred in rendering judgment against Elizabeth Houston, individually, for that the special findings of fact made by said court do not support said judgment or any portion thereof, for that the special findings of fact filed herein affirmatively show that the cause of action in favor of plaintiff lapsed with, and did not survive the death of Otho S. Houston.

V.

Said court erred in rendering judgment against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, and also erred in rendering

judgment against Elizabeth Houston, individually, for that the special findings of fact made by said court do not support said judgment or any portion thereof, for that no affirmative finding was made that a claim had been filed against the estate of Otho S. Houston, deceased, prior to the institution of this action.

## VII.

Said court erred in rendering judgment against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, in that it affirmatively appears from the said findings that to the extent of twenty-seven hundred dollars (\$2700.00) thereof the judgment is excessive in that in an action at law to recover damages for fraudulent misrepresentations inducing the trade of real estate, said judgment to the extent of \$2700.00 consisted of the rental value of plaintiff's demised premises from November 15, 1915, the date of the transfer of plaintiff's property to Otho S. Houston, to the date suit was filed herein by said plaintiff.

## VIII.

The court erred in rendering that portion of the judgment rendered against Elizabeth Houston as an individual for the reason that neither the facts alleged in said complaint filed herein, nor the findings of fact filed herein, show or state a cause of action in favor of plaintiff against said Elizabeth Houston as an individual.

IX.

The court erred in rendering that portion of the judgment rendered against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, for the reason that neither the facts alleged in said complaint filed herein, nor the findings of fact filed herein, show or state a cause of action in favor of plaintiff against said Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased.

I.

**The Cause of Action in Favor of Defendant in Error Lapsed With and Did Not Survive the Death of Otho S. Houston. Therefore the Complaint Did Not State a Cause of Action, and the Court Erred in Overruling the Demurrer and in Rendering Judgment Against the Plaintiff in Error.**

This is an action, as stated in the complaint, "for deceit," in which the defendant in error claims damages for a fraud perpetrated upon him in his lifetime by the decedent, Otho S. Houston, in inducing him to trade Los Angeles property for a trust deed upon Texas property, by misrepresenting the value of the Texas property. It is our contention:

(1) That this is an action brought to recover damages for tort committed.

(2) That under the common law an action brought to recover damages for a tort committed does not survive the death of the tortfeasor in the absence of express statute declaring such survival.

(3) That there is no specific California statute declaring that an action brought to recover damages for a fraud committed shall survive the death of the tortfeasor.

*This is a tort action brought to recover damages for a fraud committed.*

Under the California decisions, when a party has been defrauded through misrepresentations inducing a trade, he may elect either to affirm the transaction and bring his action for damages, or disaffirm the transaction and bring an action for rescission. He cannot do both.

Westerfeld v. N. Y. Life Ins. Co., 129 Cal. 73;  
Youmans v. Bell, 45 N. E. 552 (N. Y.).

The defendant in error in the instant case has elected to affirm the transaction and bring his action for damages. He has made no effort to disaffirm the transaction and no effort to state a cause of action in rescission. He has brought his action in law, entitled his complaint, "Complaint for Deceit," has affirmed the trade and has sought to recover damages.

(2) *That under the common law an action brought to recover damages for a tort committed does not survive the death of the tortfeasor in the absence of express statute declaring such survival.*

It is well settled in common law that an action for damages caused by fraud does not survive *in favor of* or *against* the personal representative. Bigelow in his treatise on Frauds, Sec. 5, p. 213, states the doctrine as follows:

“By the rules of common law, actions for damages caused by fraud do not survive to the representative of the injured party. Where such action will survive must therefore be a question of statute, and the statutes vary considerably. \* \* \* It may be added that just as there is no survivorship apart from statute in favor of the estate of a decedent who has been defrauded, so there is no survivorship apart from statute against the estate of a decedent guilty of fraud.” Bigelow on Frauds, Sec. 10, p. 251. (See cases cited therein.)

This doctrine of the common law, as thus enunciated, has been declared to be the law of this state in

Harker v. Clark, 57 Cal. 246;

Fowden v. Pacific Coast Steamship Co., 149 Cal. 153;

Hannon v. Harper, 9 Cal. App. 260;

Kramer v. Market Street Co., 25 Cal. 435.

In Harker v. Clark, an action to recover damages for false arrest, *supra*, on page 246, the court declares the foregoing doctrine as follows:

“This action is clearly within the maxim, ‘A personal right of action dies with the person,’ unless the right of action has been kept alive by some statute.”

Throughout the United States, the authorities of all the states that have passed upon the subject, uniformly hold that at common law, in the absence of statute, an action in tort dies with the tortfeasor. And the doctrine is specifically applied in actions of

deceit. The only exception to the rule exists only in those cases where an action is instituted to recover specific property wrongfully taken or converted or is instituted in assumpsit to recover the value thereof.

Reed v. Hatch, 19 Pick 47;

Henshaw v. Miller, 17 How. 212;

United States v. Daniels, 47 U. S. (6 Howd.)

11, 12 Lawyers' Ed. 323;

Jones v. Ellis Estate, 35 Atl. (Vt.) 488;

Lane v. Frawley, 78 N. W. (Wis.) 593;

Strattons Independence v. Dines, 126 Fed. 968;

Abern v. McClinchy, 90 Atl. (Me.) 709;

Rockwell v. Furness, 102 N. E. (Mass.) 914;

Newsom v. Jackson, 29 Ga. 61;

Cotting v. Tower, 80 Mass. 183;

Leggate v. Moulton, 115 Mass. 552;

Jones v. Barm, 75 N. E. (Ill.) 505;

Killen v. State Bank, 82 N. W. (Wisc.) 536;

Hedekin v. Gillespie, 72 N. E. (Ind.) 143;

Beavers Administratrix v. Putnams Curator, 67

S. E. (Va.) 353;

Carson v. Brandt, 2 Brev. (S. C.) 159;

Huff v. Waltans, 20 S. C. 477;

Jenkins v. Bennett, 18 S. E. (S. C.) 929;

Watson v. Loop, 12 Tex. 11;

Willard v. Mohn, 139 N. W. (N. D.) 981;

Young v. Aynsworth, 86 Atl. (R. I.) 555;

Demczuk v. Jenifer, 114 Atl. (Md.) 471.

In the instant case it will be observed that the learned trial judge in his opinion makes no claim that the

action survived by reason of being within any of the California statutes relating to survivorship. The opinion is based upon what the court conceives the common law doctrine of survivorship, the court declaring,

“I understand the rule to be at common law, that the party defrauded may seek relief as for the value of the thing obtained even as against the executor. Here, as the result of the fraud, the estate of the deceased has been enriched and the effort merely is to obtain that which has thus been wrongfully secured and retained,”

citing in support thereof the case of *Hambly v. Trott*, 1 Cowp. 371, and then proceeds to render judgment against the plaintiff in error. There is no finding that the estate as such was enriched. The action is one to recover damages for fraud perpetrated by the decedent, not to recover the property traded. Of course to the extent that decedent profited by the transaction, his general estate may have been benefited. If, because his estate may have been benefited, the cause of action survived at common law, then at common law all actions in tort at common law must have survived, which is not the fact.

The trial court entirely overlooks the distinction between survivorship in cases of action in tort and survivorship in actions in assumpsit or a recupatory action where the action is brought to recover the thing taken or is brought in assumpsit to recover on an implied promise to pay the value of the thing taken. The very case of *Hambly v. Trott*, cited by the learned trial

judge in support of his statement, very clearly establishes the distinction. *Hambly v. Trott* was brought in trover against the executor of a decedent who, in his lifetime, had converted some goats and other chattels belonging to the plaintiff. It was held that the action being in form a tort action, would not survive, the court indicating, however, that an action for money had and received, based upon an implied promise to pay the value of the goods converted, would survive, and declaring that a tort action as such can never survive, Lord Mansfield stating:

“So far as the tort itself goes, an executor shall not be liable.”

The case deals with the question of a recovery for conversion by the deceased, and is no authority at all on the survivorship of actions for fraud, excepting so far as it enunciates general rules adverse to the defendant in error in the present action. Lord Mansfield concludes by stating that an action in trover does not survive because the action requires a plea of guilty or not guilty, and is therefore a tort action in form, and points out that

“where the cause of action is a *tort* or arises *ex delictu* \* \* \* there the cause of action ~~does~~ as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting water courses, escape against the sheriff, and many other actions of like kind.”

It is true that in the argument with counsel at the beginning of the case, members of the court were

disposed to allow the action of trover to survive if there were no other remedies available but after the case was twice argued, the court unanimously held that actions in trover could in no case survive.

The reason back of the rule that a personal action dies with a person is undoubtedly the difficulty that an executor would have in disproving statements of the injured party. In a case such as the case at bar, where an agent of the defendant in error testifies to conversation and talks had with the decedent, and the lips of the decedent are closed in death and he may not even be able to show that he had never seen the property traded, or that such fact was known to the defendant in error who bought it subject to his own inspection, and the seal of death has prevented such proof, the decedent's excutor labors under a heavy handicap.

While it is also true that Lord Mansfield in the course of the first argument does remark that so far as the act of the offender is beneficial, his assets ought to be answerable and his executor therefore should be charged, nevertheless this remark constituted dicta and was effervescent in character and, as stated, he subsequently declared that the cause of action did not survive.

In the case of *Phillips v. Homfray*, 24 Chancery Div., 439, decided in 1883 by the Court of Appeals, almost one hundred years after *Hambly v. Trott* was decided, an action involving survivorship of an action brought to recover damages arising out of decedent's

use of plaintiffs' land to transport minerals, and in which the case of *Hambly v. Trott* was very carefully considered, the remark of Lord Mansfield was considered and declared to be dicta, Bowen, J., holding that in addition to cases *ex contractu*, there was only one other class of cases in which right of action survives, such class being those cases which are purely recupatory in character, that is, in those cases where the deceased has taken from the other party property, or its proceeds, and has enriched his own estate by such property or proceeds or value, so that in law or in equity such property belongs to the other party. In such a case the right to sue does not arise from any relationship between the parties, but is an incident to the ownership of property, and is a right which the law gives the owner of property to protect him in his ownership and possession. It is what may be termed a possessory action, the essential element of which is a present right in the property or its proceeds and the remedy granted is not damages, but the return of that which is already his, either in law or in equity. For this reason it was held in *Phillips v. Homfray* that where the deceased had derived an ascertainable, pecuniary benefit by certain tortious trespasses, and the plaintiff had suffered ascertainable pecuniary damages, nevertheless the action, not being to recover specific property, did not survive.

This rule is stated by Bowen, J., in *Phillips v. Homfray*, *supra*, at page 454, as follows:

“The only cases in which, apart from questions of breach of contract, express or implied, a rem-

edy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person, and added to his own estate or moneys. In such cases whatever the original form of action, it is in substance brought to recover property or its proceeds or value, and by amendment could be made such in form as well as in substance.

\* \* \* But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist of the acquisition of property or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which was complained of, and an indirect benefit may have reaped thereby. \* \* \* *It seems to us that Lord Mansfield does no more than indicate that there is a class of cases in which assumpsit can be brought against a wrongdoer to recover the property he has taken or its proceeds or value and that in such cases the action will survive against the executor."*

In passing, it should be noted that in this same case of *Phillips v. Homfray, Bowen, J.*, determines that no action containing an element of tort can survive, in the following language:

“We do not believe that the principle of waiver in a tort and suing in contract can be carried further than this,—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief.”

Seven years later, in 1890 the same case, *Phillips v. Homfray*, 44 Ch. D. 699, was again before the courts. Sterling, J., in delivering the opinion of the court, says:

“It was decided in the case of ‘*Hambly v. Trott*, that an action of trover was one to which the rule of law, *action personalis moritur cum persona*’ applies. \* \* \* That case was much discussed in this very case of *Phillips v. Homfray* upon the appeal (24 Ch. D. 439) and, after reading carefully the judgment of Mr. Justice Pearson and the judgments delivered in the Court of Appeal, it does not appear to me that the proposition of law on which *Hambly v. Trott* was decided was in any way disputed. It was accepted by all the judges as good law that an action of trover is one that dies with the person. The question on which the majority of the Court of Appeal differed from Lord Justice Baggallay and Mr. Justice Pearson seems to have been whether any form of action could be suggested which could be brought at law in which the damages or the sums which were sought to be recovered by means of the inquiries 2, 3 and 4 could be recovered against an executor and the opinion of the majority of the Court of Appeal was that no such action could be suggested.”

In *Kirk v. Todd*, 21 Chan. Div. 484, the Court of Appeals said:

“As I understand the rule at common law it was this—you could not sue executors for a wrong committed by their testator for which you could only recover unliquidated damages.”

In *Strattons Independence v. Dines*, 126 Fed. at page 980, which is an action to recover damages against Strattons' executors for false representations made by Stratton during his lifetime, it was there held that the question of survival of the action must be determined by the laws of England, and that under the laws of England the action did not survive, the court citing *Phillips v. Homfray*, *supra*.

The Supreme Court of the United States, in the case of *Henshaw v. Miller*, 17 How, 212, 15 L. Ed. 222, in an action for damages arising out of a fraudulent misrepresentation, approves the doctrine laid down in *Reed v. Hatch*, 19 Pick. 47, and remarks:

“The maxim of the common law is ‘*actio personalis moritur cum persona*’ and as this maxim is recognized both in England and Virginia the interpretation of it in the former country becomes pertinent to its exposition or application here. In England it has been expounded to exclude all torts when the action is in form *ex delictu* for the recovery of damages and the plea of not guilty.”

The court holding that the action abated upon the death of decedent.

In *Reed v. Hatch*, 19 Pick. 47, Shaw, C. J., says:

“The question whether the plaintiffs can cite in an administrator and proceed with their action depends on Revised Statutes, c. 93, par. 7. It is contended that a false representation by which one is induced to part with his property by sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction and not conformable to the intent of the statute. If this were the true construction, then every injury by which one should be prevented from pecuniary gain or subjected to pecuniary loss would directly or indirectly be a damage to his personal property. But we are of opinion that it must have a more limited construction and be confined to damage done to some specific estate of which one may be the owner. A mere fraud or cheat by which one sustains a pecuniary loss cannot be regarded as a damage done to personal estate. *The action is abated at common law* by the death of the defendant, and not surviving, by force of the statute, must be deemed to stand abated.”

In order then that the case survive at common law, it must be brought upon an express or implied assumpsit or else brought to recover property in the hands of the executor of the decedent.

The possibility that an action *ex contractu* is available in the case at bar is disposed of elsewhere in this brief.

The present action is not a recupatory action. Under the California decisions defendant in error had his election either to disaffirm the trade and recover back his original property, or affirm the trade and sue in damages. He has seen fit not to disaffirm the trade and not to recover his original property or its value. He has affirmed the trade, affirmed in the plaintiff in error executrix' title to the Los Angeles property and instituted an action in deceit to recover damages suffered, being the difference between the values of the two properties.

(3) *The California statutes do not provide that actions brought to recover damages for fraud committed shall survive the death of the tort feasor.*

It being the rule of the common law that an action brought to recover damages for a tort committed does not survive the death of the tort feasor, in the absence of express statute declaring such survival, the question then in the case at bar is whether the California statutes have so modified the common law as to declare that an action brought to recover damages for fraud survives the death of the tort feasor.

On the threshold of the analysis, we call attention to the fact that California Code provisions relating to actions surviving *to* the representatives of the injured party are different from those relating to actions surviving *against* the estate of a decedent, although as heretofore stated, the common law rule as to each character of actions was the same.

Sections 1582 and 1583 of the Civil Code of Procedure, and section 954 of the Civil Code, specify the instances in which the rule of the common law is modified as to the survivorship *to* the representative of the injured party. While sections 1582 and 1584 specify the instances in which the rule of the common law is modified as to survivorship *against* the estate of decedent in actions *in personam*.

Section 1582 of the Civil Code of Procedure provides:

“Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.”

In the instant case, an action cannot be maintained against the executrix under this section, because the action is not one for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and neither is the action founded upon contract.

Section 1584 provides:

“Any person or his personal representative may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or

chattels of any such person, or committed any trespass on the real estate of such person.”

This action is not one where the testator, in his lifetime, has wasted or destroyed, or taken or carried away, or converted to his own use, the goods or chattels of the defendant in error, or committed any trespass on the real estate of such person and hence the cause cannot be said to survive under the last mentioned section.

Inasmuch as the rules of the common law are in force except as they have been modified by an express provision of the statute, and inasmuch as there is no express provision of the statute declaring that an action for fraud does survive except in cases of conversion and trespass, it must be determined that the common law as to actions in fraud is in force in this state, and that the action abated by the death of Otho S. Houston, and accordingly the complaint does not state facts sufficient to constitute a cause of action.

In the case of *Harker v. Clark*, 57 Cal. 245, the complaint alleges that defendant's intestate in his lifetime, without probable cause, commenced a suit against plaintiff, and procured an order for the issuance of a writ for the arrest, detention and imprisonment of the plaintiff, by virtue of which writ, she was arrested and imprisoned until such arrest and imprisonment was adjudged to be without authority of law; that in procuring her release, she was compelled to and did employ an attorney, and paid him for his services therein five hundred dollars. The action was

brought against defendant as administratrix. The demurrer was sustained. The court says:

“This action is clearly within the maxim, ‘a personal right of action dies with the person,’ unless the right of action has been kept alive by some statute. (Broom’s Legal Maxims, p. 869, etc; 6 Wait’s Prac. 329, and cases cited there.) The statute under which the plaintiff claims a right to recover is Art. 1584, Code of Civil Procedure, by which a person ‘may maintain an action against the executor or administrator of any testator or intestate who, in his lifetime, has wasted, destroyed, taken or carried away, or converted in his own use the goods or chattels of any such person.’ The intestate Clark did not, by the arrest or imprisonment, or by thereby compelling the plaintiff Mary A. Harker to pay \$500 to her attorney, waste, destroy, take or carry away, or convert to his own use the goods or chattels of said Mary A. Harker.”

In other words, the court does not extend the right of survivorship beyond those cases where survivorship is clearly permitted by statute, and it is thus clear that a personal right of action dies with the person, unless the action has been kept alive by some statute and that the Supreme Court of California holds that section 1584 of the Code of Civil Procedure will not be construed to cover cases which it does not in terms affect.

In the case of Hannon v. Harper, 9 Cal. App. 260, two actions were consolidated on appeal. The first was an appeal from a judgment denying plaintiff’s peti-

tion for a writ of review directed to defendants, as police commissioners, based upon the alleged fact that the board had unlawfully revoked an employment agency license under which Crowley was conducting an employment agency. The second action was an appeal from a judgment denying plaintiff's petition for a writ of mandate. Subsequent to the appeal, Crowley died, and application was made to dismiss the appeal upon the ground that said right of action was not one that survives to the personal representatives of said deceased. The court says, on page 261:

“Neither case presents a cause of action which survives to or can benefit the estate of deceased. Conceding that deceased was entitled to have the proceedings of the board of police commissioners, whereby they revoked his license, set aside and annulled, and likewise conceding that he was entitled to have issued to him the license as prayed for in his petition for writ of mandate, they were nevertheless personal rights and privileges not assignable and not assets of his estate. (Buck's Estate, 184 Pac. 57 (64 Am. St. Rep. 816, 39 Atl. 821).) The proceedings belong to that class of actions which, upon the death of plaintiff, abate without right of revivor in the personal representative of the deceased. (Booze v. Humbird, 27 Md. 1.)”

In the case of *Kramer v. San Francisco Market Street R. R. Co.*, 25 Cal. 435: An action was brought to recover damages for the death of plaintiff's son. It was held, first: That a civil action for the death

of a person, *per se*, cannot be maintained by any one at common law; that a personal action dies with the person, and that unless a right of action is given by statute, such right of action cannot be maintained, and it was there held that inasmuch as the statute only gave the right of action to the personal representatives of the deceased, that an action for the death of a child would not lie in favor of the father.

In the case of *Fowden, Special Administrator v. Pacific Coast Steamship Co., et al.*, 149 Cal. 151, one Mark Fowden, while a passenger on defendant's steamer, was injured through defendant's negligence. Judgment was rendered in his favor. Subsequent to the entry of judgment and the order on motion for new trial, the plaintiff died, and Frank Fowden, as special administrator of his estate, was substituted. The doctrine of *Harker v. Clark*, 57 Cal. 245, was reaffirmed, although it was held that the rule had no application because judgment was entered in fact during the lifetime of Mark Fowden, the court stating:

"It is urged that plaintiff's action being based on negligence resulting in his personal injury, his death abates the action and vacates everything done therein. Defendant thus invokes the application of the common-law rule, *actio personalis moritur cum persona*, and it may be conceded that the rule applies to such a cause of action as is stated in the complaint herein, and that no change in the common-law rule material to such a cause of action has been made by statute in this state. (See *Harker v. Clark*, 57 Cal. 245.)"

As heretofore stated, section 1584, C. C. P., permits the survival in cases of conversion, and *Coleman v. Woodworth*, 28 Cal. 567, declares that an action against the administrator for the conversion of personal property by the decedent, survives, because such survivorship is specifically provided for in such cases by statute.

The case of *Henderson v. Henshaw*, 54 Fed. Rep. p. 320, relied upon by plaintiff in the court below, was an action wherein the *plaintiff*, who had been defrauded, died pending the suit, and it was held that under the Civil Code, section 954, the action survived in favor of his personal representative. It will be observed that this action brought by the personal representative was an action *in favor* of the representative of a person defrauded and *not against* the representative of the man who in fact perpetrated the fraud. It will be remembered that the statutes relative to survivorship of actions in favor of a personal representative are not identical with the statutes involving survivorship against the representative of a decedent. Section 954, C. C., upon which this decision was based, relates only to survivorship in favor of the personal representative whose rights of property have been violated. The decision in question is not in any way helpful in determining what actions survive *against the* representatives of a person who has perpetrated a fraud.

In *McCord v. Martin*, 34 Cal. App. 129, our position is fortified by the declaration of the court:

“It is true, as the respondents contend, that naked actions for fraud and deceit are not the subject of assignment under long and well settled rules of equity.”

In that case, however, it was held, in substance, that the defendant had fraudulently received a sum of money which equitably belonged to the plaintiffs’ assignors, and accordingly, plaintiffs’ assignors could properly assign that which equitably belonged to them.

In *Clark v. Goodwin*, 170 Cal. 527, it was held that an action for damages for the death of the husband of plaintiff, given by section 377 of the Code of Civil Procedure, cannot be maintained against the personal representatives of the person causing such death, and that the action abated upon the death of the wrongdoer prior to suit brought. The court cited with approval *Harker v. Clark*, *supra*, saying:

“Nothing was more firmly settled at common law than the rule that such a cause of action, except under certain circumstances which do not exist here, does not survive the death of the person to or by whom the wrong was done. This rule exists here, excepting insofar as it has been modified or abolished by statute,” citing and quoting from *Harker v. Clark*.

The court further analyzes section 1582 of the Code of Civil Procedure and declares that it

“is limited by its terms to actions for the recovery of property or the possession thereof or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts.”

Fox v. Hale & Norcross Silver Mining Co., *et al.*, defendants, reported in 108 Cal. at page 478, and also in 108 Cal. 369. In this case, the decision of the court was rendered on the 26th day of May; the defendant, Hobart, died on the second of June. Thereupon his executors were substituted as defendants, and the trial court ordered its findings and judgment thereon to be entered against Hobart, "*nunc pro tunc*" as of the 26th day of May. The Supreme Court held, in 108 Cal. at 478, that it was proper that "*nunc pro tunc*" findings should be entered, and that thereupon a judgment should have been entered against the other defendants. The court further remarks:

"The right of the plaintiff to maintain the action against the executors of Hobart is fully authorized by section 1584 of the Civil Code of Procedure," (relating to conversion) "(see, also, Coleman v. Woodworth, 28 Cal. 567)" (also an action involving a conversion). "It falls within the rule given by Lord Mansfield in Hambley v. Trott, 1 Cowp. 371, 'Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.'"

in which action, it will be remembered, the court declared that an action in trover would not survive, but indicated that actions in assumpsit should survive.

The foregoing language constitutes the entire reasoning of the court on the subject of survivorship. The facts are rather complicated and will be found set forth in 108 California Reports, page 369. In a word, Hobart, the decedent, Hayward and Levy, his

codirectors, were parties to a scheme by which they converted assets of the Mining Company to their own use. The court held that the action survived as coming within section 1584, C. C. P., and within the doctrine enunciated in *Coleman v. Woodworth*, *supra*, both of which relate to and provide for survivorship in cases of conversion. Although even such holding was unnecessary to the decision of the case because the court further held that a *nunc pro tunc* judgment was properly entered as of the date of the decision, where at the time of the decision the decedent defendant was alive.

It is thus clear that the California courts have held that at common law, in the absence of some statutory provision, actions to recover damages for a tort do not survive and that the statutes of California as construed by the Supreme Court of California do not provide for the survivorship of actions in deceit for a fraud perpetrated.

## II.

**The Complaint, Furthermore, Does Not State a Cause of Action if We Are to Assume That the Action Is Based on Contract, in That There Is No Allegation and No Affirmative Finding That a Claim Was Filed Against the Estate of Otho S. Houston Prior to the Institution of the Action.**

The complaint does not allege that a claim was filed against the estate prior to suit brought and there is

no finding to that effect. If the cause of action is to survive at all, it must be because it is founded upon contract. Only in case it is founded upon contract can it be made to be brought within section 1584, C. C. P., *supra*. Assuming that the action founded in contract, it became the duty of defendant in error to present a claim to the administrator for its allowance.

Section 1493, C. C. P., provides:

“All claims arising upon contracts, whether the same be due, not due, or contingent, and all claims for funeral expenses and expenses of the last sickness must be filed or presented within a time limited in the notice, and any claim not so filed or presented is barred forever; \* \* \*.”

And it is the law that no action can be maintained thereon unless such claim has been presented before the action was begun.

Section 1500, C. C. P., provides:

“No holder of any claim against an estate shall maintain any action thereon, unless the claim is first filed with the clerk, or presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint, but no counsel fees shall be recovered in such action unless such claim be so filed or presented.”

And a cause of action is not stated unless it is averred that a claim has first been presented to the clerk or filed with the administrator.

Burke v. Maguire, 154 Cal. 462;

Morse v. Steele, 149 Cal. 304;

Pearson v. Parsons, 173 Cal. 339;

Reed v. Reed, 178 Cal. 187.

As was stated in Burke v. Maguire, *supra*,

“A complaint against an estate, stating a cause of action sounding in contract, which does not aver that a claim for the cause of action sued on has been thus presented to the administrator, fails to state a cause of action.”

In the case of Morse v. Steele, *supra*, an action brought against the executrix for damages in the sum of \$8000.00 for breach of contract, the court says, on page 305:

“To meet this, appellant contends that the cause of action set forth in the complaint is not for breach of contract, but is for tort pure and simple, and that the presentation of a claim is therefore not necessary. This position is untenable.”

In Pearson v. Parsons, 173 Cal. 339, it was held that unless a claim for damages on account of a breach of the contract was included in the claim presented to the administrator, that evidence thereof was properly excluded. This was an action against the administrator of a decedent for damages for failure to deliver certain trees as provided by contract, and for dam-

ages caused by the fraudulent and negligent action of decedent in failing to have on hand the trees. On the second trial, the court below was of the opinion that damages for the latter course, that is, the fraudulent action in not having the trees on hand, was not included in the claim presented to the administrator, and that evidence could not be received in support of a demand for a claim not so presented. It was held that the lower court was correct in its conclusion that the claim presented to the administrator did not include the demand for damages caused by the negligence of the vendor whereby he did not have the trees ready for delivery at the time of the demand and properly excluded the evidence.

In *Reed v. Reed*, 178 Cal. 187, an action was brought against the administrator of the estate and was based upon the allegation that plaintiff had given decedent \$2250.00 as the purchase price of certain stock in a corporation, that the corporation was in fact insolvent, and the stock worthless, but the decedent had represented that it was of great value and worth the price, and that by that means sold the stock to her; and that decedent further represented that he considered the money a trust fund and would guarantee plaintiff against loss, that if the money were lost he would repay the money so paid by plaintiff; that the representations were untrue and the stock worthless. No claim was filed against the estate. The court says:

“It is well settled that a suit against an executrix to enforce a money demand upon contract

cannot be maintained unless a claim therefor is presented to the executrix and is rejected prior to the beginning of the action. The most that can be said of this complaint is that it states a cause of action for money upon an implied contract against the decedent. It is, therefore, insufficient because of the failure to allege the presentation of the claim."

### III.

**There Is Absolutely No Warrant for the Judgment Against Elizabeth Houston as an Individual. The Complaint Does Not State any Cause of Action Against Her on any Possible Theory, and the Findings Do Not Support any Judgment Against Her as an Individual.**

The complaint does not allege, and the findings do not find that Elizabeth Houston made any fraudulent misrepresentations or in any way participated therein, nor does it appear that she has received any of the property conveyed to the deceased or has derived any benefit from the alleged fraudulent transaction. It is almost too clear for argument that to hold one liable in an action for deceit, he must be connected in some manner with the fraudulent transaction. The rule is correctly stated in 20 Cyc. 84, as follows:

"A person cannot of course be held liable for a fraudulent misrepresentation unless he made it himself or authorized another to make it for him, or in some way participated therein."

The same principle is also stated in 12 Ruling Case Law, Sec. 149:

“Relief on the ground of fraud can be had only against those who are shown to have been parties thereto. \* \* \*”

Nor can one be effected by false representations which are neither inducted by him nor made with his knowledge, nor can he be deprived of any right by fraudulent acts in which he does not participate. To warrant relief in any case, therefore, it must appear that the fraud was committed either by the person sought to be charged or by his procurement or with his authority.

Civil Code, Sec. 1572.

#### IV.

The Judgment Against Elizabeth Houston as Executrix Is Excessive to the Extent of Twenty-Seven Hundred Sixty Dollars Thereof. Defendant in Error Recovered Judgment Against Elizabeth Houston as Executrix Not Only to the Extent of the Difference Between the Reasonable Value of What He Parted With and the Reasonable Value of What He Received, but Also to the Extent of Twenty-Seven Hundred Sixty Dollars Which Consisted of the Rental Value of Defendant's in Error Demised Premises From the Date of the Trade to the Date Suit Was Filed.

It was found in paragraph XIV of the findings that the difference in value between the property defendant

in error traded and the property he received is \$7,000; that nevertheless the court found as a conclusion of law that the defendant in error had been damaged not only in the sum of the aforesaid \$7000, but also in the further sum of \$2760, being the rental value of the premises traded by him from the date of the trade to the date of filing complaint. Judgment was ordered rendered accordingly, and was so rendered.

The well settled doctrine is that in actions for damages for fraud arising out of exchange of properties, the measure of damages is the "difference between the reasonable value of what the defrauded party parted with and the reasonable value of what he received."

Rockefeller v. Merritt, 76 Fed. 909;

Graf v. Holcombe, 277 Fed. 687, 691;

Cross v. Bouck, 175 Cal. 253, 256;

Sigafus v. Porter, 179 U. S. 116 (21 Sup. Ct. 34).

These cases all lay down the doctrine stated as constituting the measure of damages and as fixing the detriment which defendant in error suffered by reason of the trade and exchange. Notwithstanding that the measure of damages is as stated, additional damages were awarded which equaled the rental value of the premises from the time of the alleged fraud to the date of suit.

The counsel for defendant in error, in preparing his findings and judgment, merely confused the law applicable to legal and equitable remedies, and the

court undoubtedly assumed that the findings and judgment were properly prepared. Had counsel filed an action in rescission to rescind the trade, the court, in ordering a rescission might very properly have ordered an accounting and awarded defendant in error the rentals in connection with such rescission. But he was entitled to no such relief in a law action.

Respectfully submitted,

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